No. 86-1071

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF ALASKA, PETITIONER

v.

RICHARD E. LYNG, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of Agriculture reasonably interpreted Section 6(a) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 340, 48 U.S.C. Ch. 2 note at 578, under which the State may select, "with the approval of the Secretary * * *," up to 400,000 acres of lands from national forests in Alaska "[f]or the purposes of furthering the development of and expansion of communities," to require that the State's selections be lands that have a nexus to established or prospective communities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes – Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 797 F.2d 1479. The opinion of the district court (Pet. App. B1-B31) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1986. On October 29, 1986, Justice O'Connor extended the time within which to file a petition for writ of certiorari to and including December 23, 1986. The petition was filed on December 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 6(a) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 340, 48 U.S.C. Ch. 2 note at 578, provides that "[f]or the purposes of furthering the development of and expansion of communities," the State may select, "with the approval of the Secretary of Agriculture,"

up to 400,000 acres from national forest lands. It further provides that all selections "shall be adjacent to established communities or suitable for prospective community centers and recreational areas." *Ibid.*[1]

In accord with the statutory language, the Forest Service for many years has consistently interpreted Section 6(a) to require a "community nexus." Before the Forest Service will approve a selection by the State, it must be shown that the selected land is either adjacent to an established community or suitable for prospective community centers and recreational areas, and that there is a reasonable expectation that the selected land will be used for community development and expansion.

The State voiced no objection to the Forest Service's interpretation for almost twenty years, until late 1976, when the State adopted a new interpretation of Section 6(a).[2] In an opinion letter issued in 1977, the Attorney General of Alaska concluded that the State could select lands under Section 6(a) without showing any community nexus or expectation of actual use for the selected purpose (C.R. 18, at 25).

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[1] Section 6(a) also permits the State, for the same purposes and subject to the same conditions, to select up to 400,000 acres "from the other public lands of the United States in Alaska • • •," with the approval of the Secretary of the Interior. By contrast, Section 6(b), which confers upon the State a general authority to select up to 102,550,000 acres of unreserved public lands, contains no similar adjacency or suitability limitations and lacks a purpose clause. Other subsections of Section 6 automatically vest title to specified lands or improvements, without prior selection by the State or approval by the federal government. See Section 6(c)-(f), (i)-(k), and (m).

[2] The State had made its first selections in the early 1960's; by 1969, the Forest Service had approved selections aggregating more than 20,000 acres. E.R. 35-36. "E.R." refers to appellants' excerpts of the record filed in the court of appeals. "C.R." refers to the clerk's record in the district court.

2. On December 19, 1977, the State of Alaska filed applications under Section 6(a) for 247,597 acres in the Chugach and Tongass National Forests (Pet. App. A3). The Regional Forester approved approximately 200,000 acres of the selections and disapproved 51,050 acres of those selections (*id.* at A4).[3] The disapproved selections were among several selections proposed by the State for "marine recreation" sites or for fish hatchery sites.

The Forest Service did not disapprove all of the State's selections for marine recreation and fish hatchery sites; indeed, such selections were approved where there was sufficient information to indicate that the statutory criteria had been met. But the Forest Service initially deferred decision on several selections where the State provided insufficient information and the Service was without independent information to support a finding that a selection satisfied the Act.

After the State declined to provide sufficient information to support those selections, the Forest Service disapproved recreational land selections that were more than 25 nautical miles from an existing community, unless independent evidence indicated the selection was suitable for community-based (as opposed to regional, state or nationwide) recreation use.[4] Proposed fish hatchery sites that were isolated from existing or prospective community

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[3] We have been advised that since enactment of the Statehood Act, the Forest Service has approved approximately 268,000 acres of national forest lands selected by the State under Section 6(a).

[4] When information indicating a nexus between a selection and an established or prospective community was not forthcoming from the State and was not otherwise available, the Forest Service utilized a rule of thumb under which selected lands are considered to be "community-linked" if they are within 25 nautical miles of a community. Contrary to its description by petitioner, the 25-mile guideline is not a fixed rule, but can be overcome by other information to indicate that a particular recreation area selection is community-linked (see E.R. 39-41).

centers were similarly disapproved, while those reasonably accessible to existing communities or prospective community centers were approved.[5]

3. The State brought this suit challenging the administrative decision. The district court granted the State's motion for summary judgment, holding that the Forest Service had erred in its interpretation of the statute. The court ruled (Pet. App. B27-B29) that Section 6(a) allows the State to select vacant and unappropriated land anywhere in Alaska national forests for community or general recreational purposes, as long as the land is physically suitable for either purpose. The court also agreed with the State (Pet. App. B29) that since almost all national forest lands are physically suitable for recreation, Congress must have intended the State to have "*carte blanche*" to select any such lands for a recreational purpose. The court thus concluded (*id.* at B30-B31) that the only substantive restriction upon the State's ability to obtain title to vacant and unappropriated national forest lands under Section 6(a) is the statutory 400,000-acre cap.

4. The court of appeals reversed. It held (Pet. App. A16-A21) that the Secretary's interpretation of Section 6(a) is reasonable and remanded the case to the district court to determine whether the Secretary's application of Section 6(a) to the disapproved selections was arbitrary and capricious. The court of appeals noted that this Court "has held that the 'approval of the Secretary' power conferred under land grant statutes gives the Secretary the authority and the duty 'to determine the lawfulness of the selections' " (Pet. App. A8 (citation omitted)). And the

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[5] The State appealed the Regional Forester's disapprovals to the Chief of the Forest Service, who affirmed the decisions of the Regional Forester (Pet. App. A4). The Secretary of Agriculture declined review of the decision, rendering the Chief's decision the final administrative determination of the Department of Agriculture (*ibid.*).

court rejected the State's contention that Section 6(a) provides an unconditional grant of 400,000 acres, since the statutory language and legislative history show that the Forest Service's interpretation of Section 6(a) is faithful to congressional intent.

Judge Schroeder, writing separately, concurred in the court's decision that the Statehood Act requires a community nexus and dissented from the portion of the decision upholding the Forest Service requirement that the selection generally be within 25 miles of existing or already planned communities (Pet. App. A22).

ARGUMENT

The interlocutory judgment of the court of appeals in this case is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner contends (Pet. 9) that the Forest Service has misconstrued the Alaska Statehood Act.[6] But the interpretation upheld by the court of appeals is the interpretation that has been followed since enactment of the statute by the agency charged with administering the provision at issue. Under well-settled principles of statutory construction, a reasonable interpretation of a statute by the agency to which Congress has entrusted the statute's administration is entitled to deference. *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9-10, 17; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845

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[6] Petitioner asserts (Pet. 7 n.11) that it does not seek review of the court of appeals' decision that prospective recreational sites must have a community nexus, and apparently now agrees that the word "community" modifies both "centers" and "recreational areas" in the statutory phrase "suitable for prospective community centers and recreational areas" (see Pet. 8).

(1984); *Alcoa* v. *Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 389-390 (1984); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Petitioner isolates (Pet. 10) the terms "suitable" and "prospective" in the statutory phrase "suitable for prospective community centers and recreational areas," and suggests that the only reasonable definitions for these terms are those petitioner has selected from a dictionary.[7] In this way, petitioner asserts (Pet. 8) "the statute's only requirement is physical suitability for future use." The court of appeals, however, looked to the context in which the words were used, including the statement of purpose in Section 6(a), and concluded that (Pet. App. A20):

> Because the stated purpose of the grant is to further community development and expansion, it is not unreasonable to require the state to show some expectancy that the land will be used for those purposes. One factor going into a determination of suitability * * * is the likelihood that people will move there.

The Secretary's interpretation properly advances Congress's stated purpose and gives meaning to the word "prospective" by limiting approval to those selections offering a reasonable prospect of actual use for the statutory purposes.

The Secretary's interpretation also takes into account—as petitioner's interpretation does not—the fact that Section 6(a) is only one of several provisions granting

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[7] The dictionary upon which petitioner relies also provides definitions consistent with the Secretary's interpretation that, in order to be *suitable* for *prospective* community centers and recreational areas, there must be a reasonable prospect that the land will actually be so used. See *Webster's Third New International Dictionary* 2286 (unabridged ed. 1966) (suitable: "having the necessary qualifications: meeting requirements"); *id.* at 1821 (prospective: "in prospect" or "effective in the future").

federal land to the State. While Section 6(a) in terms enables the State to select land for the specific purposes of community development and expansion, Section 6(b), which is directed to the more general needs of the State, bestows on the State an additional grant of more than 102 million acres of public lands (see note 1, *supra*).[8]

Finally, the Secretary's interpretation is supported by the legislative history. For example, the "Principal Land Provisions" section of the 1954 Senate Report to accompany S.50, 83d Cong., 1st Sess. (1953), described the national forest land grant as "[l]ands adjacent to the various Alaska communities, including lands in the national forests, *which will be needed* for the expansion of those communities or the creation of new ones." S. Rep. 1028, 83d Cong., 2d Sess. 4 (1954) (emphasis added).

At the Senate hearing on the proposed bill, that provision was discussed by the territorial governor of Alaska who had participated in its drafting. See *Alaska Statehood, Hearings on S.50 Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 2d Sess. 137-140 (1954) (*Hearings*). As that discussion makes clear, community development was identified both as the underlying purpose of the national forest land grant and as a substantive requirement for selections (*id.* at 138-140):

> Senator Anderson: So that as to this particular section, it would be your judgment that it is desirable to make grants for the expansion of communities?

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[8] It was Section 6(b) that accomplished the stated congressional goal of "alter[ing] the distorted landownership pattern" in Alaska through the land grants (H.R. Rep. 624, 85th Cong., 1st Sess. 6 (1957)), a purpose that petitioner incorrectly attributes to Section 6(a) (Pet. 2-3). See 104 Cong. Rec. 12011-12012 (1958) (statement by Senator Jackson distinguishing between the "express purpose" of Section 6(a) and Section 6(b)'s broad "purpose of getting the land out of Federal ownership and onto the tax rolls to help expand the existing base for self-government.").

Governor Heintzleman: That is right; 200,000, I think, would be enough, but I don't have objection to 400,000.

Senator Anderson: I think 200,000 would be enough, too, but some people said we failed to visualize the opportunities of future growth. * * *

* * * * *

Governor Heintzleman: I think the language as here now is sufficient. It says, "The Secretary of Agriculture shall agree." It has to be an agreement between the Secretary of Agriculture and the State. And I don't look for any trouble on that score at all.

Senator Anderson: You have to show some cause for it.

Governor Heintzleman: That is right.

Senator Clements: If they needed 200,000, they would get 200,000, and if they ever wanted 400,000, they could get it.

* * * * *

Senator Anderson: * * * Now, the means test was somewhat unpopular in WPA days, but we did intend that a means test should be applied to this, that they actually needed the relief before they got it. And if the language can be rephrased so that it is clear that this is to be granted to them only as they expand into these areas and need it, that is exactly what I intended to do.[9]

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[9] Earlier in those same hearings, there had been some confusion that only the public lands, and not the national forest lands, need be "adjacent to established communities or suitable for prospective community centers and recreational areas." Senator Anderson, however, confirmed that "[t]hey are both limited to that." *Hearings* 6. Senator

These congressional objectives were carried forward in Section 6(a) as enacted.[10]

2. Petitioner also challenges the Forest Service's 25 nautical mile rule of thumb for recreational selections, and the disapproval of several fish hatcheries. As noted above, the Forest Service applied that rule of thumb only after the State declined to provide to the Forest Service sufficient information supporting its selections. Even then the 25-mile standard, which is based on factors indicating that 25 nautical miles is a distance reasonable for non-overnight recreation, was merely one guide for determining whether a particular recreational site was sufficiently tied to a community to meet the statutory requirements. That "rule" was not dispositive when other information indicated a community nexus (E.R. 41). The selections at issue in this case were disapproved when, upon petitioner's failure to provide additional information showing a reasonable tie between the selection and existing

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Jackson suggested expanding the grant clause beyond community expansion and development, but no changes were made in response to his comments (*id.* at 6-7).

[10] Congress has twice amended restrictions in the Statehood Act which concerned the State's selections under Section 6(a). In 1963, Congrees amended Section 6(g), reducing the minimum acreage required for a Section 6(a) selection from 5,760 acres to 160 acres. In the Department of Agriculture's legislative report to Congress on the amendment, the Secretary explained his interpretation of Section 6(a) and recommended, based on that interpretation, that the amendment be adopted. S. Rep. 468, 88th Cong., 1st Sess. 2-3 (1963). Congress did not take issue with this interpretation of Section 6(a) when it amended Section 6(g), and the legislative history of the amendment indicates that Congress agreed with the Forest Service's interpretation. *Id.* at 1-2. This Court has stated that legislative approval of the established administrative interpretation in the course of amending the statute is "virtually conclusive." *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 12. In 1980, Congress extended the 25-year period for Section 6(a) selections to 35 years. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 906(a), 94 Stat. 2437.

or prospective communities, and upon review of other available information, there was an insufficient basis for concluding that certain selected sites had the required community link. This, of course, does not preclude the possibility that some of the same lands could be the subject of a future selection by the state and, upon a proper showing, could be approved.

3. There is no merit to petitioner's contention (Pet. 17) that there is a "long history of deference to statehood compacts" which "limit the Forest Service's role to a procedural function of verifying that Alaska's selections met the statutory criteria." Section 6(a) includes no such limitation; it provides that "lands shall be selected * * * *with the approval of the Secretary of Agriculture* as to national forest lands" (emphasis added). This Court has repeatedly found that a requirement of "approval" by the Secretary is a congressional charge to determine whether the selections are in compliance with the grant. *E.g., Payne* v. *New Mexico,* 255 U.S. 367, 371 (1921). Accord, *Wyoming* v. *United States,* 255 U.S. 489, 503-504 (1921); *Wisconsin Cent. R.R.* v. *Price County,* 133 U.S. 496, 512 (1890). The Secretary thus has the duty, "judicial in nature" (255 U.S. at 371 (citations omitted)), to determine the lawfulness of the selections.[11]

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[11] Contrary to petitioner's assertion (Pet. 17), *Andrus* v. *Utah,* 446 U.S. 500 (1980), does not support the proposition that the Secretary lacks authority to restrict Alaska's selections absent subsequent enabling legislation. Under the Utah Enabling Act of 1894, ch. 138, 28 Stat. 107 *et seq.*, Congress granted Utah, upon admission, four numbered sections in each township, identified specifically in the Act, for the support of public schools. 28 Stat. 109. There was no requirement that the public school lands be approved by the Secretary. The Act also permitted Utah to substitute "indemnity lands" if the designated sections had already been disposed of pursuant to another act of Congress, such "indemnity lands" to be selected as the state legislature provided, "with the approval of the Secretary of the Interior." *Ibid.* No conditions were placed on the State's selection of indemnity lands other than that such selections be of unappropriated,

In determining the lawfulness of selections, the Secretary has reasonably concluded that Congress intended that the Forest Service approve selections when information indicates a reasonable likelihood of community use for national forest lands.[12] Under the Administrative Procedure Act, 5 U.S.C. 706, petitioner cannot prevail unless it shows that the Secretary acted outside of his statutory authority, or that the disapprovals of the State's selections were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." See, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 413-414 (1971). The latter issue will be the subject of the proceedings to be held in the district court upon the

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nonmineral lands. In *Andrus* v. *Utah*, this Court explained that prior to subsequent legislation it was "clear * * * that the State's title to unappropriated land in designated sections could not be defeated after survey, and that their right to indemnity selections could not be rejected if they satisfied the statutory criteria when made, and if the selections were filed before the lands were appropriated for other purposes." 446 U.S. at 511. At issue in that case was whether subsequent legislation modified the Secretary's approval authority in the Utah Enabling Act to authorize the Secretary to disapprove selections which met the enabling Act's original requirements. The Court concluded that later legislation did have that effect. *Id.* at 520. There is no comparable issue in this case, nor is the grant or purpose language in Section 6(a) similarly limited in scope so as to reduce the Secretary to a purely ministerial role.

[12] Deference to the agency's interpretation is particularly appropriate in cases involving a land grant. It is well established that "land grants are construed favorably to the government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *United States* v. *Union Pacific R.R. Co.*, 353 U.S. 112, 116 (1957); accord *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978) (when grants of federal lands are at issue, any doubts "are resolved for the Government"). See also *United States* v. *Sweet*, 245 U.S. 563 (1918); *Humboldt County* v. *United States*, 684 F.2d 1276 (9th Cir. 1982).

remand ordered by the court of appeals. In its present interlocutory posture, the case does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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